IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	Court of Appeals
	)	Division One
	)	No. 1CA-CR04-0563 PRPC
Respondent,	)	
v.	)	Maricopa County
	)	Superior Court
	)	No. CR 1997-010238
DAVID BRUCE RACKNEY,	)	
	)	
Petitioner.	)	DEPARTMENT E
	)	
	)	ORDER

Presiding Judge Lawrence F. Winthrop and Judges Donn Kessler and Patricia K. Norris have considered this petition for review from the trial court's denial of post-conviction relief.

IT IS ORDERED denying review.

DATED this 21st day of July, 2005.

/s Lawrence F. Winthrop
LAWRENCE F. WINTHROP
PRESIDING JUDGE

1 CA-CR 04-0563 PRPC

Maricopa County Superior Court
CR 1997-010238

A true copy of the foregoing
was mailed July 21, 2005 to:

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Gerald R Grant
Maricopa County Attorney's Office
Jefferson Street Office
301 W Jefferson St
Phoenix AZ 85003-2191
Attorneys for: Respondent

Craig C Gillespie
Law Offices of Craig C Gillespie
Suite 290
2025 North Third St

Phoenix AZ 85004
Attorneys for: Petitioner

Hon Eddward P Ballinger Jr, Judge
Maricopa County Superior Court
Central Court Building
201 W Jefferson St
Phoenix AZ 85003-2243
Philip G Urry, Clerk
By

/s
Deputy Clerk

Craig C. Gillespie, No. 013008
CRAIG C. GILLESPIE, P.C.
2025 N. Third Street, Suite 290
Phoenix, Arizona 85004-1426
(602) 253-1010
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. DAVID BRUCE BRACKNEY (B), Defendant.	CASE No.: CR1997-010238 **AFFIDAVIT OF JEFF ZURBRIGGEN**

State of ARIZONA)
) ss.
County of MARICOPA)

JEFF ZURBRIGGEN, being first duly sworn upon his oath, deposes and states:

1. By appointment of the Court, I represent Appellant, David Bruce Brackney, on Direct Appeal in Maricopa County Superior Court Matter CR97-10238(B).

2. The Arizona Court of Appeals issued its Memorandum Decision denying relief and affirming Mr. Brackney's convictions on January 30, 2003.

3. On Direct Appeal, I further represented Mr. Brackney on his Petition for Review filed with the Arizona Supreme Court.

4. By Order dated September 9, 2003, the Arizona Supreme Court denied the Petition for Review, Arizona Supreme Court No. CR03-0134-PR.

5. On October 9, 2003, the Arizona Court of Appeals issued its Order and Mandate indicating copies of the Order and Mandate were mailed to "each party appearing or the attorneys of record."

6. I did not receive a copy of the Order and Mandate or notification of any kind whatsoever that the Mandate had issued. I first learned that the Mandate had issued upon contact by Mr. Brackney in February 2004.

7. When Mr. Brackney contacted me in February 2004, he stated he had just learned himself that the Mandate had issued based upon research conducted by a fellow inmate at the Arizona State Prison.

8. I have no reason to believe Mr. Brackney received notice of the Mandate being issued prior to his contacting me in February 2004.

FURTHER THE AFFIANT SAYETH NOT.

/s Jeff Zurbriggen
Jeff Zurbriggen

SUBSCRIBED AND SWORN TO before me this 19th day of May 2004 by Jeff Zurbriggen.

/s Corinne M. Grisaffi
Notary Public

My Commission Expires:

(SEAL) Corinne M. Grisaffi
Notary Public-Arizona
Maricopa County
Expires 03/15/07

Craig C. Gillespie, No. 013008
CRAIG C. GILLESPIE, P.C.
2025 N. Third Street, Suite 290
Phoenix, Arizona 85004-1426
(602) 253-1010
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. DAVID BRUCE BRACKNEY (B), Defendant.	CASE No.: CR1997-010238 **AFFIDAVIT OF DAVID BRUCE BRACKNEY**

State of ARIZONA)
) ss.
County of MARICOPA)

DAVID BRUCE BRACKNEY, being first duly sworn upon his oath, deposes and states:

1. By appointment of the Court, Jeff Zurbriggen represented me, David Bruce Brackney, on Direct Appeal in Maricopa County Superior Court, Case No.: CR97-10238(B).

2. The Arizona Court of Appeals issued its Memorandum Decision denying relief and affirming my convictions on January 30, 2003.

3. On Direct Appeal, Jeff Zurbriggen further represented me on my Petition for Review filed with the Arizona Supreme Court.

4. By Order dated September 9, 2003, the Arizona Supreme Court denied the Petition for Review, Arizona Supreme Court No. CR03-0134-PR.

5. I did not receive not receive a copy of the Order and Mandate or notification of any kind whatsoever that the Mandate had issued until early February 2004 through research conducted by a fellow inmate at the Arizona State Prison.

6. When I contacted Jeff Zurbriggen in February 2004, he stated he had not received a copy of the Order and Mandate or notification of any kind whatsoever that the Mandate had issued. Mr. Zurbriggen suggested I immediately file my Notice of Post-Conviction Relief with the Superior Court, which I did on February 9. 2004.

FURTHER THE AFFIANT SAYETH NOT.

/s David Bruce Brackney
David Bruce Brackney

SUBSCRIBED AND SWORN TO before me this 21st day of June 2004 by David Bruce Brackney.

/s Corinne M. Grisaffi
Notary Public

My Commission Expires:
(SEAL) Corinne M. Grisaffi
Notary Public-Arizona
Maricopa County
Expires 03/15/07

Form 24(c). (Amended) Notice of Post-conviction Relief
IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. David Bruce Brackney, Defendant.	No. CR 97-10238 **NOTICE OF POST-CONVICTION RELIEF**

Instructions: When the notice is complete, file it with the clerk of the superior court of the county in which the conviction occurred.

A person unable to pay costs of this proceeding and to obtain the services of a lawyer without substantial personal or family hardship should indicate this by requesting counsel in Question 6 of this notice and execute the AFFIDAVIT OF INDIGENCY on page 4. In the event an attorney is not appointed, a Request for Preparation of Post-Conviction Relief Record form must be filed by the defendant if some portion of the record is needed and has not previously been obtained.

NO ISSUE WHICH HAS ALREADY BEEN RAISED AND DECIDED ON APPEAL OR IN A PREVIOUS PETITION FOR POST-CONVICTION RELIEF MAY BE USED AS A BASIS FOR A SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF.

1. Defendant's Name and prison number (if any): David Bruce Brackney ADOC #150619.

2. Defendant's Address: 1B20L Morey Blue, ASPC Lewis, P.O. Box 3300, Buckeye, AZ 85326-3300.

3. (A) Defendant was convicted of the following crimes: Felony Murder (2 counts), Agg. Assault, B&E, Child Endangerment (4 counts), Unlawful Imprisonment.

(B) Defendant was sentenced on Feb. 16, 2000, to a term of (2) Life w/o parole +90 yrs., commencing on April 11, 2000, following a

Trial by: ☒ Jury ☐ Judge without a Jury

Plea of: ☐ Guilty ☐ No Contest

Probation Revocation: ☐ Admission ☐ Violation in the Superior Court of: _____ County with Judge _____ presiding.

(C) The file number of the case was CR-97-10238.

4. Defendant has taken the following actions to secure relief from his convictions or sentences:

(A) Direct Appeal: ☒ Yes ☐ No

(B) Previous Rule 32 Proceedings: ☐ Yes ☒ No

5. Defendant was represented by the following lawyers at: (provide name of counsel and counsel's address, if known)

Trial of change of plea: James Lagatutta, Joe Heinzl

Sentencing Hearing: James Lagatutta, Joe Heinzl

Appeal (if any): Jeff Zurbriggen

Previous Rule 32 proceedings (if any): n/a

6. Defendant is presently represented by a lawyer:

☐ Yes ☒ No

(If yes, provide name and address.)

_____

If no, does the defendant request the court to appoint a lawyer for this proceeding?

☒ Yes ☐ No (Jeffrey M. Zurbriggen requested)

7. **Respond to this section only if this is an untimely notice or the defendant has filed a previous Rule 32 petition in this case.**

(A) Is a claim pursuant to Rule 32.1(d), (e), (g), or (h) being raised in this petition?

☒ Yes ☐ No

(B) If yes, state the specific exception:

☐ The defendant is being held in custody after the sentence impose has expired.

☐ Newly discovered material facts exist which probably would have changed the verdict or sentence.

☒ The defendant's failure to file a timely notice of post-conviction relief or notice of appeal was, without fault on the defendant's part.

☒ There has been a significant change in the law that would probably overturn the conviction or sentence.

☐ Facts exist which establish by clear and convincing evidence that the defendant is actually innocent.

(C) State the facts that support the claim and the reasons for not raising the claim in the previous petition or in a timely manner.

Defendant was not advised of mandate of sentence (still hasn't received official notification from the AZ Appellate Court). Trial counsel did not provide effective assistance on the following points: failure to request a jury instruction based upon A.R.S. 13-3892 which disallowed an affirmative defense to establish justification of entry into a third party dwelling to effect an attempt at legal apprehension of a wanted felon. This created a fundamental error in the jury instructions that was not properly addressed at the trial level. The instruction that was given contradicted established law. Defense Counsel acted unreasonably by failing to file a motion for a new trial on grounds that the jury was not instructed on ARS 13-3892. New law, effective Aug 2003, on the use of stun belts in a hearing and at trial without the proper hearing for need of such a device was never held in defendant's case, therefore defendant was denied the right to effectively assist in his defense due to psychological duress. Trial counsel failed to object to the entry on trial record of heresay evidence (i.e.- testimony about the alleged Durango St. incident give by co-defendant Ron Timms).

I AM REQUESTING POST-CONVICTION RELIEF. I UNDERSTAND THAT I MUST INCLUDE IN MY PETITION EVERY GROUND FOR RELIEF WHICH IS KNOWN AND WHICH HAS NOT BEEN REAISED AND DECIDED PREVIOUSLY. I ALSO UNDERSTAND THAT FAILURE TO RAISE ANY KNOWN GROUND FOR RELIEF IN MY PETITION WILL PROHIBIT ME FROM RAISING IT AT ANY FUTURE DATE.

February 2, 2004	/s David Bruce Brackney
Date	Defendant

AFFIDAVIT OF INDIGENCY

I have requested the appointment of a lawyer to represent me in Question 6. I swear under oath and penalty of perjury that I am indigent and because of my poverty I am financially unable to pay for the services of a lawyer without incurring substantial hardship to myself or my family.

/s David Bruce Brackney
Defendant

Subscribed and sworn to before me on Feb 2, 2004
(date)

12-21-2006
My Commission Expires

/s Roxanne Sutton
Notary Public

(OFFICIAL SEAL)
ROXANNE SUTTON
NOTARY PUBLIC-ARIZONA
MARICOPA COUNTY
My Comm. Expires Dec. 21, 2006

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1997-010238 03/04/2004

CLERK OF THE COURT
R. Luiszer
Deputy

HONORABLE EDDWARD BALLINGER, JR.

FILED: 03/05/2004

STATE OF ARIZONA GERALD R GRANT

v.

DAVID BRUCE BRACKNEY (B) ROBERT W DOYLE

APPEALS-PCR-CCC
COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-CCC
DAVID B BRACKNEY #150619
ASPC - LEWIS - MOREY BLUE
PO BOX 3300
BUCKEYE AZ 85326-3300

MINUTE ENTRY

Defendant filed on February 9, 2004 a Notice of Post-Conviction Relief in this case where the appellate mandate on direct appeal was issued on October 9, 2003. Defendant claims that pursuant to Rule 32.1(f), Arizona Rule of Criminal Procedure, he should be allowed to file this untimely notice because he was not advised of the appellate mandate and still has not received official notification from the Court of Appeals.

Rule 32.1(f) allows an untimely "notice of post-conviction relief of-right or notice of appeal" to be filed if a defendant shows that the failure to timely file was "without fault on the defendant's part." Defendant's notice is not "of right" because he has had his direct appeal to the Court of Appeals. Defendant is not entitled to any relief under Rule 32.1(f). *See Moreno v. Gonzalez,* 192 Ariz. 131, 962 P.2d 205 (1998).

IT IS THEREFORE ORDERED dismissing defendant's Notice of Post-Conviction Relief, pursuant to Rule 32.2(b).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1997-010238 06/08/2004

CLERK OF THE COURT
R. Luiszer
Deputy

HONORABLE EDDWARD BALLINGER, JR.

FILED: 06/09/2004

STATE OF ARIZONA GERALD R GRANT

v.

DAVID BRUCE BRACKNEY (B) CRAIG C. GILLESPIE

COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

The Court has reviewed defendant's Motion for Reconsideration of this Court's Minute Entry Dated March 4, 2004, Dismissing Defendant's Petition for Post-Conviction Relief. Defendant claims that his notice is an "of-right" proceeding and therefore he should be allowed to proceed, even though the notice was not filed timely, based on Rule 32.1(f), Arizona Rules of Criminal Procedure. Defendant is incorrect. Rule 32.1 clearly defines an "of-right" proceeding as one following conviction based on a guilty or no contest plea:

> "Any person who pled guilty or no contest... shall have the right to file a post-conviction relief proceeding,

and this proceeding shall be known as a Rule 32 of-right proceeding."

Defendant was convicted following a jury trial, and pursued a direct appeal. As he points out in his motion for reconsideration, the comment to the 2000 amendment to Rule 32.1(f) reaffirmed that "[r]elief pursuant to subsection (f) will continue to be unavailable to all post-conviction relief proceedings not 'of-right.' See Moreno v. Gonzalez, 192 Ariz. 131, 962 P.2d 205 (1998)." Rule 32.1(f) relief is unavailable to defendant because his Rule 32 proceeding is not "of-right."

IT IS THEREFORE ORDERED denying defendant's Motion for Reconsideration of this Court's Minute Entry Dated March 4, 2004, Dismissing Defendant's Petition for Post-Conviction Relief.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1997-010238 07/28/2004

CLERK OF THE COURT
R. Luiszer
Deputy

HONORABLE EDDWARD BALLINGER, JR.

FILED: 07/29/2004

STATE OF ARIZONA GERALD R GRANT

v.

DAVID BRUCE BRACKNEY (B) CRAIG C. GILLESPIE

COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

The Court has reviewed defendant's Motion for Rehearing, filed on June 22, 2004. For the reasons stated in the Court's minute entry issued June 8, 2004 and no good cause appearing.

IT IS ORDERED denying defendant's Motion for Rehearing.

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	) Arizona Supreme Court) No. CR-05-0351-PR)
Respondent,	) Court of Appeals
v.	) Division One) No. 1CA-CR 04-0563PRPC)
DAVID BRUCE RACKNEY,	) Maricopa County) Superior Court
Petitioner.	) No. CR 1997-010238

ORDER

The Clerk of the Supreme Court having been authorized by the Supreme Court to order any party to file a Response to a Petition for Review at the direction of a Supreme Court staff attorney,

IT IS ORDERED that the State shall file a Response to the Petition for Review on or before February 1, 2006.

DATED this 12th day of January, 2006.

/s Kathleen E. Kempley
Kathleen E. Kempley
Chief Deputy Clerk

TO:
Hon Terry Goddard, Arizona Attorney General
Attn: Randall M Howe
Andrew P Thomas, Maricopa County Attorney
Attn: Gerald R Grant
Craig C. Gillespie, Law Offices of Craig C Gillespie

David Bruce Brackney, ADOC #150619, Tucson - Santa Rita Unit
dw

(SEAL OF THE SUPREME COURT
STATE OF ARIZONA)

SUPREME COURT

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

TELEPHONE: (602) 542-9396

NOEL K. DESSAINT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

RE: STATE OF ARIZONA v. DAVID BRUCE BRACKNEY
Arizona Supreme Court No. CR-05-0351-PR
Court of Appeals Division One No. 1 CA-CR 04-0563 PRPC
Maricopa County Superior Court No. CR 1997-010238

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 7, 2006, in regard the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 8th day of February, 2006.

Noel K. Dessaint, Clerk

TO:
Hon Terry Goddard, Arizona Attorney General
Attn: Randall M Howe
Andrew P Thomas, Maricopa County Attorney
Attn: Gerald R Grant
Craig C Gillespie, Law Offices of Craig C Gillespie
David Bruce Brackney, ADOC #150619, Arizona State Prison,
Tucson- Santa Rita Unit
West Publishing Company
Lexis-Nexis
Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix
kg

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	) Court of Appeals
	) Division One
Respondent,	) No. 1CA-CR04-0563PRPC
v.	)
	) Maricopa County
DAVID BRUCE RACKNEY,	) Superior Court
	) No. CR 1997-010238
Petitioner.	)
	) ORDER

The court has considered petitioner's request to stay the issuance of the mandate in this matter. Although the court does not issue a mandate in a discretionary review from the denial of post-conviction relief, when review has been denied, the court does issue a certified order denying review. Therefore,

IT IS ORDERED granting the motion and staying the issuance of this court's certified order denying review to and including May 30, 2006. If, during the period of this stay, there is filed with the clerk of the clerk of the appellate court a notice that the petitioner has filed a petition for a *writ of certiorari*, the stay shall continue in effect until the clerk is notified by the United States Supreme Court that the writ has been denied or, in a case which the writ has been granted, that a mandate has been issued by the United States Supreme Court.

Dated this 3rd day of March, 2006.

/s Anthony Mackey
ANTHONY MACKEY
JUDGE PRO TEMPORE

1 CA-CR 04-0563 PRPC

Maricopa County Superior Court
CR 1997-010238

A true copy of the foregoing
Was mailed March 3, 2006 to:

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Phoenix AZ 85003-2191
Attorneys for: Respondent

Craig C Gillespie
Law Offices of Craig C Gillespie
Suite 290
2025 N Third St
Phoenix AZ 85004
Attorneys for: Petitioner

Philip G Urry, Clerk
By

/s Deputy Clerk Signature
Deputy Clerk